



12-1-1957

Legal Profession in Colonial America

Anton-Hermann Chroust

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Anton-Hermann Chroust, *Legal Profession in Colonial America*, 33 Notre Dame L. Rev. 51 (1957).

Available at: <http://scholarship.law.nd.edu/ndlr/vol33/iss1/4>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE LEGAL PROFESSION IN COLONIAL AMERICA*

I. INTRODUCTION

Dean Pound once stated "that there is no law without lawyers."¹ For law, at least as we know it and as it can be found in advanced civilized societies, begins with lawyers: it begins when the tradition of conducting transactions, of deciding causes and of advising parties to controversies passes into the hands of a specialized and skilled profession. Justice according to law is always justice administered by lawyer judges aided by lawyer advocates.

In order to understand the particular conditions of the legal profession in the American colonies, two things must be kept in mind: First, a class of professional—expert, skilled and properly trained—lawyers cannot possibly flourish until there has been developed something resembling a distinct and consistent body of laws, a distinct and consistent procedure, and a settled jurisdiction, including regular courts manned by a trained and competent personnel. Secondly, the society in which the lawyer works or intends to work must, to some degree, accept him as a professional man, call for his professional services and generally honor and respect him as well as permit him to find his livelihood in the practice of law. What, then, were the "legal" and social conditions in the American colonies with which the legal practitioner was confronted?

It should also be kept in mind that the various American colonies were founded separately and operated independently of one another, often on greatly different principles and for vastly different purposes. They did not pursue a common policy or follow a parallel development. Each colony had its own government; and, at least in the beginning, each subsisted with little or no contact with the others. In addition, geographical, ethnological, climatic, economic as well as sociological conditions largely differed among the individual colonies.

In the beginning of colonial legal development, the question whether or not the common law of England was wholly or in part binding upon the colonial courts, was hotly debated for some time in nearly every colony. Not until the end of the

* *Part one of a three-part series.*

1 POUND, *A HUNDRED YEARS OF AMERICAN LAW* 8 (1937).

seventeenth century, and in some colonies even later, was the common law on the whole accepted as the law of the land. In New England, for instance, the Puritan clergy for a long time had complete and uncontested control over the community. The colonists there held to the belief that the clergy, and the clergy only, possessed all the knowledge and experience necessary for good government and good laws. Accordingly, it was determined that the magistrates should decide causes "as neere [near] the law of God [or Moses] as they can."² Thus an early attempt at systematizing and codifying the law in Massachusetts, an attempt which dates back to the year 1636, was wholly founded on the Old Testament and was referred to by the significant title, "A copy of Moses, his judicials, compiled in an exact manner."³ Also, it was stated that in cases for which the code contained no provisions, the "word of God" and not the common law of England was to guide the courts or magistrates. The common law was to be observed only in so far as it was declaratory of the divine law, as understood and interpreted by the New England divines. As a result, pertinent or non-pertinent citations from the Scriptures often decided the outcome of a litigation, and it was said that the early Massachusetts courts frequently resembled a heated theological disputation where an opinion allegedly voiced by Moses counted infinitely more than a decision of the Lord High Chancellor.⁴

With the possible exceptions of Virginia and Georgia, where the common law of England was received at a fairly early date and in a relatively complete manner, the colonists, as a rule, did not recognize the common law as *ipso facto* binding upon their courts. As a matter of fact, they were decidedly anxious to escape from its provisions and the very ideas or principles for which it stood. The common law of the time, even in England, was not popular among the general populace; it was especially unpopular among the class of people who constituted the vast majority of those who emigrated to the New World. It was still in the rather harsh state of the strict law. Its formalism, not to mention its technical language, was distrusted by the settlers;

² Order of the General Court, May 25, 1636. 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 175 (Shurtleff ed. 1853).

³ 16 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 275 (2d Series 1902). See also 1 WINTHROP, HISTORY OF NEW ENGLAND 196 (Hosmer ed. 1908).

⁴ WASHBURN, JUDICIAL HISTORY OF MASSACHUSETTS 106 (1840).

and the ideas and ideals which it enunciated fitted an organized mediaeval society rather than a fairly disorganized pioneer society. Nor can it be overlooked that the common law of the time, which was really declaratory of a feudal spirit, as well as the courts which enforced it, had rather severely dealt with dissenters who, after all, constituted a large segment of the colonizers. And these colonists were, or thought they were, representatives of a new era of individualism which conflicted with the mediaeval or feudal notion of solidarity and organization manifest in the strict common law.

As a result of this general attitude towards the common law of England, it was frequently enforced in the colonies only so far as it had been adopted by statute, that is, to the extent the colonists, by assent or custom, had decided to recognize it. This attitude is well expressed by Judge John Bannister Gibson of Pennsylvania in *Lyle v. Richards*: "In the infancy of this colony [the legislature] . . . produced not only a modification of some of the rules of the common law, but a total rejection of many of the rest."⁵ The colonists apparently were of the opinion, expressed by a Massachusetts magistrate in 1687, that "[W]e must not think the laws of England follow us to the ends of the earth or whither we went."⁶ And around the year 1700 a Boston divine expostulated that "they were not bound in conscience by the laws of England," to which an English observer remarked that the methods employed and the laws applied by the New England courts were "abhorrent from the law of England and all other nations." As late as 1774 John Adams stated that New England derived its laws "not from parliament, not from the common law, but from the law of nature Our ancestors were entitled to the common law . . . so much as they pleased to adopt, and no more. They are not bound or obliged to submit to it unless they chose."

Connecticut went so far as to enact as its first provision "that no law of England shall be in force in their government till made so by act of their own." Since the common law of England was never adopted by statute in Connecticut, its gradual recognition there was solely due to progressive and, one may say, clandestine judicial application, that is to say, exclusively to gradual usage

⁵ *Lyle v. Richards*, 9 S.&R. 322, 338 (Pa. 1823).

⁶ 4 WORKS OF JOHN ADAMS 122 (1851).

and the personal influence of some trained lawyers. Still, as late as 1798 it was pronounced that the colonists "were free from any subjection [to the common law of England]. The laws of England had no authority over them, to bind their persons, nor were they in any measure applicable to their conditions and circumstances here."⁷ In *Poor v. Greene*, William Tilghman, Chief Justice of Pennsylvania, admirably restated this peculiar situation: "Every country has its common law. Ours is composed partly of the common law of *England*, and partly of our own usages [O]ur ancestors . . . took with them such of the *English* principles as were convenient for the situation It required time and experience to ascertain how much of the *English* law would be suitable to this country. By degrees, as circumstances demanded, we adopted the *English* usages, or substituted others better suited to our wants, till at length, before the time of the revolution, we had formed a system of our own"⁸

However, in a discussion with Benjamin Franklin in 1789, Governor Pownall of Massachusetts asserted that the colonists, being Englishmen, carried "with them the laws of the land" and that, "therefore, the common law of England . . . is . . . at all times the law of those colonies and plantations." Franklin's answer is a categorical denial: "They carried with them," he declares, "a right to such parts of laws of the land, as they should judge advantageous . . . [and] a right to make such others as they should think necessary, not infringing the general rights of Englishmen." As for the common law, it is law in the colonies only "so far as they have adopted it; by express laws or by practice."⁹

As regards English statutes in particular, the colonies, with the exception of South Carolina and North Carolina, either decided to ignore them completely or, in some more moderate instances, attempted to follow a policy aptly described by Peter Oliver, Chief Justice of Massachusetts: "All the English Statutes before the Colonies had Existence were to be extended here . . . all made since . . . did not extend here."

⁷ Introduction, 1 Root III (Conn. 1899).

⁸ *Guardians of the Poor v. Greene*, 5 Binn. 554, 558 (Pa. 1813).

⁹ 4 FRANKLIN'S WORKS 300 (Bigelow ed. 1893). Franklin's comments were communicated directly to Pownall.

Because of this attitude the early colonists in their respective colonies were gradually developing a sort of common law of their own which often greatly differed from that of England as well as from that of the other colonies. This highly flexible and eclectic body of laws, which contained elements inherited from the motherland, was decisively affected by local customs, usages and mere expedients that were in keeping with the exigencies of the particular conditions of time and place. In this, American colonial law had all the characteristics of a law commonly found among pioneer societies.

This highly unstable and fluid situation was further aggravated by the fact that authoritative legal materials were extremely scarce and, in some instances, simply non-extant. There were hardly any law reports, and only a few law books, most of them inadequate. The few existing records or reports of the English common law were either in Law Latin or Law French; and Law French, in the words of James Bradley Thayer, was "a barbarous jargon in which the reporter's ignorance of French was eked out by Gallizised Latin, Gallizised English, and offhand analogies."¹⁰ It has been estimated that down to the American Revolution only about forty-eight legal treatises were printed in the colonies. But none of these, Professor Eldon Revare James, former librarian of the Harvard Law School, contends, "could be called a treatise intended for the use of the professional lawyer."¹¹ They were, in fact, meant for the use of laymen and designed to assist them in the everyday incidents of business and other affairs. Conversely, the few copies of Coke's *Institutes* (published between 1628 and 1644) which found their way to America, contained little useful information for the average colonist or colonial lawyer. In addition, this work was written in a highly technical language which was unfamiliar and certainly repugnant to the average settler. It completely failed to touch upon the actual conditions of life as they existed among a population of individualist pioneers. Hence, authoritative and competent as well as accessible and understandable legal materials—an important factor for the unification and stabilization of the

¹⁰ ADDRESS BY JAMES B. THAYER, RECORD OF COMMEMORATION, NOV. 5 - 8, 1886, OF THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE 319 (1887).

¹¹ JAMES, *A List of Legal Treatises Printed in the British Colonies and the American States before 1801*, HARVARD LEGAL ESSAYS 159 (1934).

administration of justice—were sorely lacking in the early American colonies.

The early colonial lawyers no less than the courts were handicapped not only by the serious dearth of English law books and English law reports, but also by the absence or unavailability of printed copies of the colonial statutes. With the exception of Massachusetts and Connecticut, the colonies were late in printing their statutes: New York in 1710; Rhode Island in 1730; New Jersey in 1732; Virginia in 1733; South Carolina in 1736; Pennsylvania in 1742; and Maryland in 1765. And even where the statutes had been printed, it was unusual for the practitioner, except for the very rich lawyer, to possess a complete set of the statutes of his own colony. At the same time, there existed no public law libraries or "bar association" libraries; and the early college libraries (Harvard, William and Mary, and Yale) contained few, if any, law books. The first catalogue of the Harvard College Library of 1723, aside from the works of Bacon, Grotius and Seldon, lists the following legal titles: Coke's *First and Second Institutes*, Pulton's *Statutes*, Spelman's *Glossary*, Keble's *Statutes*, and two volumes of the *Year Books*. When in 1764 the library was destroyed by fire, Thomas Hollis presented to Harvard seven law books which for some time to come constituted the whole "Harvard Law Library": Bacon's *Historical Discourse*, Burn's *Ecclesiastical Law*, Carpenter's *Glossarium*, Glanvill's *Tractatus*, Prynne's *Sovereign Power of Parliament*, Horne's *Mirror* and the *Theodosian Code*.

At first, the legislature or General Assembly, and in some instances, the Royal Governor or his designated deputies, or the Governor and Council, constituted the sole recognized court of law in the different colonies. An independent and separate judiciary was in fact unknown until the last decades of the seventeenth century—even, in some colonies, far into the eighteenth century. As a rule, the administration of justice was controlled by the Royal Governor who frequently appointed some of his trusted friends or henchmen to the bench. In this he often acted on the advice of the home government or the Proprietor. In addition, the Governor of certain colonies constantly and purposely interfered with whatever judicial system existed. In New York, for instance, following the example of the Stuart Kings, the Governor simply removed a Chief Justice from office because he had decided against him, while in South Carolina the execu-

tive appropriated all judicial offices in order to enforce its arbitrary and capricious dictates. Around the middle of the eighteenth century a contemporary observer stated that the "Governor and such of the council as he thinks proper to consult with, dispense with such provincial laws as are troublesome or stand in their way" In consequence, the administration of justice in some of the colonies often amounted to personal justice without law rather than justice according to law. In New England, on the other hand, the Puritan divines in their zealous devotion to "the word of God" tried very hard to monopolize all magistracies, including all judicial offices, hoping to guide the settlers solely in the spirit of the Scriptures, especially the Old Testament. In this they often combined a rather arbitrary interpretation of the Scriptures with their own highly personal sense of moral justice and moral propriety.

This situation, disturbing from the point of view of a consistent administration of justice according to law, was further aggravated by the fact that even where a distinct judiciary existed, the courts, as a rule, were manned by laymen, with the possible exception of the Chief Justice. And in some instances even the Chief Justice was not a trained lawyer. Until the very end of the eighteenth century, for reasons of expediency as well as due to the serious dearth of trained lawyers, it was simply necessary and, in some places, considered even advisable, to resort to judges not familiar with the law. This was especially true in the lower courts; but the higher courts, including the supreme court of a colony, also had their share of incompetent and often ill-tempered laymen. And finally, not until quite late were there any published reports of colonial decisions which might have been used as guides to the courts.

It must also be borne in mind that the early settlers, as a rule, came from a segment of the English population which as a class had rarely, if ever, come into contact with the common law courts at Westminster and the kind of law that was administered there. Their forensic experiences, whatever they might have been, had been limited to minor local courts which handled cases in the rather perfunctory and haphazard manner of permitting proceedings to be had by an informal bill, plaint or petition drawn in colloquial English and personally presented by the party itself. No wonder that the early colonists and early colonial courts should frequently imitate the less regular and certainly informal

practices of the minor English courts rather than the strictly settled procedures observed and enforced at Westminster. Also, the early colonial courts, like the minor English local courts, were staffed with men who, on the whole, had little or no training in the law and, hence, were often totally ignorant of the law and, especially, of procedure. It took considerable time before sound legal training and experience was considered an essential prerequisite for a colonial judge. As late as 1764 it was held in New Jersey that the "gentlemen sitting on the benches of the courts of law in the Colonies . . . are not to be expected to be lawyers or learned in the law." Between 1691 and 1778 only four of the eleven Chief Justices of New York had any degree of legal training, while in Massachusetts only nine of the thirty-six judges who sat on the highest bench between 1692 and 1775 were lawyers of a sort.

Under such conditions it is not surprising that the various colonial courts, as Thomas Pownall, the Governor of Massachusetts, wrote in 1764, "bred variety of law, especially in the several counties; for, the decisions and judgments being made by divers courts and several independent judges and judiciaries who had no common interest amongst them in their several judicatories, thereby in process of time every several county would have several laws, customs, rules and forms of proceedings."

The general situation confronting the legal profession in the early colonial courts may be summarized as follows: English law and English precedents frequently were neither followed nor used as a guide by the courts in the administration of justice with the result that the law, as well as procedure, was constantly in flux. The courts were staffed or, at least, dominated by wealthy merchants, clergymen, governors or governors' deputies, by politicians, favorites or influential men who either had been appointed by the powers in being or had been elected by an ill-informed or ill-willed electorate. Practically none of these "judges" had any legal training or were expected to be conversant in the law. The law itself often was extremely flexible and amateurish and, in some instances, the highly questionable product of personal caprice, prejudice or just plain ignorance. Needless to say, such a situation did not, and could not, produce or support a strong class of professional lawyers.

For a number of reasons lawyers as a class were especially unpopular in the early colonies. First, the Puritan revolution,

which caused many people to migrate to the New World, was in principle hostile to lawyers. The Puritans as well as the Quakers had severely suffered, or thought they had suffered, under the existing laws of England. It was only natural that they should blame the legal profession for the harshness and iniquities of the law. Secondly, in the minds of many people, both in England and the colonies, the legal profession was often identified with the law officers of the Crown, including the Royal Justices who, especially during the Stuart period, perverted English justice and English liberties in the interest of the Crown. Thirdly, many of the persons who in the colonies presented themselves as lawyers or attorneys were men of no professional training or competence and, as often as not, of no ethical standards. Those who acted as attorneys or lawyers were overwhelmingly sharpers, spellbinders and pettifoggers; and they frequently stirred up litigation solely for the sake of fees. It was the sharp trader or the clever land speculator, the man of easy penmanship and clever volubility who, as a rule, "practiced law." This situation induced the majority of the colonies to pass legislation forbidding men to act as attorneys for others in litigation. It goes without saying that such legislation greatly hampered the emergence of a respectable and competent class of lawyers. In addition to this popular and wide-spread aversion, the legal profession also experienced the jealousy and animadversion of the dominant class of land owners, planters and merchants, who, especially in Virginia, Maryland and New York, were loath to share their social, economic and political power with "outsiders" and "upstarts" who might threaten their control over the community. In Massachusetts the lawyer was also faced with the hostility of the dominant Puritanical clergy and the religious elements in the community who did not tolerate the exercise of any sort of influence upon the people by another class, or who, like the Quakers, were opposed to any activity connected with litigation, strife or controversy.

The emergence of a class of professional lawyers in colonial America was also hampered for a long time by the inadequacy of proper training facilities for the native-born. In the colonies there were no collegiate lectures on law before 1780, and no law schools before 1784. In addition, the study of law was seriously limited by the dearth of competent law books and law reports. Any native person desiring to prepare himself for the profession

prior to the American Revolution had five avenues open to him: Firstly, he could by his own efforts pick up whatever scraps of legal information he might find in available books or libraries. Patrick Henry, for instance, is said to have prepared himself for the bar by secluding himself for six weeks in order to read *Coke upon Littleton* and whatever Virginia Statutes were at hand. That this kind of self-directed reading was not altogether successful may be gathered from the fact that George Wythe, one of his three "bar examiners"—in Virginia candidates for admission to the bar were examined by a committee appointed by the Supreme Court—refused to sign Patrick Henry's license, and John Randolph, who "passed him" rather reluctantly, "perceived him to be a young man of genius . . . [but] very ignorant of the law . . ."¹² It was this ignorance of the law which, together with his persistent aversion to systematic study, stood in the way of Patrick Henry's ultimate success as a lawyer.

Secondly, the aspiring lawyer could acquire some legal knowledge by serving as a scribe, copyist or "assistant" in the clerk's office of some court, rounding out this rather ineffective and scanty training by reading whatever legal materials were accessible. This kind of preparation for the bar, which was quite popular with men who could not afford the expense (and the time) of entering the law office of some leading practitioner, often prevented the student from acquiring, as Hugh Blair Grisby of Virginia puts it, an "intimacy with the law as a science. As long as the case lay in the old routine, this class of lawyers would get along very well; but novelties were unpleasant to them; they hated the subtleties of special pleading, and they turned pale at a demurrer."

Thirdly, the student could enter the law office of some outstanding and experienced lawyer, preferably one with a relatively extensive law library, and learn the law by close personal association, observation, imitation, occasional perusal of law books and direct (and sometimes indirect) instruction from his mentor. Also, he copied out pleadings and other legal documents, and drafted briefs. In return he was expected to pay what often amounted to a considerable sum of money. This kind of training or apprenticeship, however, had many serious defects. The senior lawyer frequently was too busy and, in some instances,

¹² WIRT, SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY 34 (1818).

too haughty to pay much attention to the younger men who as often as not were completely left to their own devices. The personal relation between master and apprentice at times was reserved and even unpleasant, as may be gathered from the recollections of William Livingston who served his apprenticeship in the law office of James Alexander: "[If lawyers] deserve the imputation of injustice and dishonesty, it is in no instance more visible and notorious than in their conduct towards their apprentices These gentlemen must . . . have no manner of concern for their clerk's future welfare. . . . [W]hoever attentively considers how these apprentices are used . . . would certainly imagine, that the youth was sent to the lawyer on purpose to write for him. . . . I averr, that 'tis a monstrous absurdity to suppose, that the law is to be learnt by a perpetual copying of precedents. . . ." Of James Wilson it was said that he hardly ever devoted any time to his students, that he was practically useless as an instructor, and that he "would never engage with them in professional discussions. To a direct question, he gave the shortest possible answer; and a general request for information was always evaded."¹³ John Quincy Adams, on the other hand, gives a glowing report about the relations of Theophilus Parsons to his students: "It is of great advantage . . . to have Mr. Parsons in the office. He is in himself a law-library . . . but his chief excellency is, that no student can be more fond of proposing questions than he is of solving them. He . . . always gives a full and ample account, not only of the subject proposed, but of all matters which have any intimate connection with it. I am persuaded that the advantage of having such an instructor is very great. . . ."¹⁴

Fourthly, a student of the law could always go to England and become a member of one of the four Inns of Court, provided he or his parents had sufficient means to finance such an expensive project. Once in London, aside from the instruction which he received at his Inn, he could attend the courts at Westminster and come in contact with some of England's leading lawyers and judges. Between thirty and forty, and perhaps more, American-born lawyers were educated at the various Inns of Court prior to the year 1760, and more than one hundred between 1760 and the American Revolution: forty-seven from South Carolina,

¹³ SANDERSON, BIOGRAPHY OF THE SIGNERS OF THE DECLARATION OF INDEPENDENCE 519 (1865).

¹⁴ 16 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 361 (1902):

twenty from Pennsylvania, sixteen from Maryland, five from New York and at least one or two from each of the remaining colonies. The reason why ambitious (and wealthy) young men preferred to go to London in order to study law is clearly revealed in a letter which Charles Carroll of Carrollton, who had chambers in the Middle Temple, received from his father in 1759: "Many reasons ought to incline you to a close and serious study of ye law: it is a shame for a gentleman to be ignorant of ye laws . . . and to be dependent on every dirty pettifogger On the other hand [and here the father sounds like Cicero or Lord Chesterfield, both of whom he might have read], how commendable it is for a gentleman . . . not only not to stand in need of mercenary advisors, but to be able to advise and assist his friends, relatives and neighbors The law of England is not . . . only the road to riches, but to ye highest honours I do not send you to ye Temple to spend (as many do) four or five years to no purpose. I send you to study and labour; it is what I expect of you — do not disappoint my hopes" Obviously, the son did not heed the father's good advice, because in 1760 the father wrote again: "I think a student in ye Temple cannot apply himself properly to his studies and spend above 300 pounds a year [a very considerable amount of money in those times]. Whether you spend 200 or 300 a year is to me immaterial, but to you it cannot be so, if by spending your money you misspend your life" Then the father gives his reasons why the son who, as we know, had a low opinion of the legal education offered at the Middle Temple, should continue his studies there: "You vainly at present fancy you might study here [meaning in America]. . . . A long series of years, research and experience, show that it was necessary to have particular places appointed for ye study of ye law; and that in such, a knowledge of it is soonest and best acquired."¹⁵

Barristers called to the bar by the Inns of Court in England were in the main regarded as persons properly qualified to practice law in the American colonies, including Massachusetts. The English trained lawyer usually had advantages over his American trained brethren in that, as a rule, he had studied in the chambers of an experienced English barrister, that he had at-

¹⁵ These letters can be found in ROWLAND, *UNPUBLISHED LETTERS OF CARROLL OF CARROLLTON AND HIS FATHER* (1902).

tended the Readings and participated in the Moots which were part of the educational program provided by the Inns of Court, that usually he had access to far better law libraries than those existing in America, and that he had the opportunity of attending and taking notes in the courts in Westminster which must be considered to have been the very heart of the common law of the time.

The professional influence which these lawyers trained in England had on the colonial bar, especially in the southern colonies, is beyond imagination. They frequently were the mentors of the next generation of colonial lawyers and as such established as well as handed down a tradition of professional excellence and high professional accomplishment. Some of the "student notes," in fact, which they had taken while attending their Inn or the courts at Westminster, were often used profitably in their native land, and in one known instance they were at the basis of an important colonial decision.¹⁶ In addition, being thoroughly trained in the tradition of English liberties and immemorial rights of Englishmen rather than merely in legalistic technicalities, the English educated lawyers contributed heavily and perhaps decisively to the coming movement for independence. In many instances they actually became the leaders of the American Revolution.

The fifth and last method by which a young man wishing to enter the legal profession could train himself was by attending one of the several colleges which had sprung up during the seventeenth (Harvard 1636, William and Mary 1696) and eighteenth centuries (Yale 1700; College of New Jersey, now Princeton 1746; King's College, now Columbia University 1754; College of Philadelphia, now University of Pennsylvania 1756; Queen's College, now Rutgers University 1766; Dartmouth College 1769). As a matter of fact, a large number of eighteenth century colonial lawyers were college bred; and even some of the seventeenth century lawyers, especially in Massachusetts, had prepared themselves for the bar at Harvard. Practically all of the early Massachusetts lawyers of standing and repute were Harvard graduates. New York, on the other hand, at least during the first half of the eighteenth century, seems to have had an exceptionally small number of college educated men. In that

¹⁶ *Clayton v. Clayton*, 3 Binn. 476 (Pa. 1811).

colony, commerce apparently preoccupied the leading families to such an extent that their sons preferred to enter the counting house rather than the college. In 1741 there were only seven college bred lawyers in the whole colony of New York, four of whom were the Livingston brothers who were probably considered "egg heads" by their contemporaries. "To the disgrace of our first planters," William Smith remarks about his own time, "who beyond comparison surpassed their eastern neighbors in opulence, Mr. James Delancy . . . and Mr. Smith were for many years the only academics in the Province [of New York] . . . and, so late as 1746, the author did not recall above thirteen more." During the latter part of the eighteenth century, however, when the legal profession had attained to great eminence and certainly to respectability in New York, more and more college trained men, mostly graduates from King's College, joined the bar.

On the eve of the American Revolution the colonial legal profession, especially the urban lawyers, ranked at the top of the colonial gentry. They had achieved, on the whole, social standing and economic success. In addition, they had become professionally articulate and politically alert. Hence it is not surprising that they would assume a leading role in the approaching Revolution.

II. MASSACHUSETTS

The history of the legal profession in colonial Massachusetts was decisively, even drastically determined by a number of factors which, to some degree, sets it apart from all other colonies. In the first place, the Puritanical clergy with its particular outlook and aims exerted a profound influence on the whole communal of the colony, including the administration of justice. Secondly, the Puritan colonists displayed a strong spirit of independence which, prompted by their personal experiences in England as dissenters, often bordered on outright dislike and rejection of everything English, especially of English political and legal institutions. And, thirdly, practically from its very inception, Massachusetts contained within its borders an influential college — Harvard College, founded in 1636 by a Puritan clergyman — which contributed much to the strengthening of the peculiar "Massachusetts spirit." But it must also be remembered that such influential leaders in the colony as Winthrop, Dudley, Endicott and John Cotton were strongly opposed to

democracy in any form; they were zealous to prevent any independence in religious views, and in general had no trust in the people at large. A veritable policy of intellectual and spiritual repression was inaugurated by both lay and clerical leaders; and harshness of rule, narrow-mindedness of outlook and self-satisfaction with extremely limited achievements became characteristic of early Massachusetts. Early Massachusetts cannot claim to have shown the way to either civil or religious liberty, and the results of this prolonged intellectual repression, which lasted throughout the seventeenth century, were long to be felt.

In Massachusetts, as in Connecticut and Rhode Island, the early colonists refused to recognize the common law of England as either *de facto* binding upon them or even acceptable in many instances. On the contrary, remembering the harshness with which they had been dealt with by English law and, especially by the law officers of the Crown, they wished to escape from it and from the very ideas for which it stood. The *General Laws and Liberties of New Plymouth Colony* provided, for instance, that the courts should apply the "express Law of the General Court [a body which acted both as legislature and court] of this colony, the known law of God, or the good and equitable laws of our Nation, suitable for us." It was held that "such laws would be fittest for us which should arise *pro re nata* upon occasions."¹⁷ Such conditions, to be sure, were quite to the liking of the governing Puritan clergy to whom the earliest colonists looked for guidance and advice in all matters of consequence, believing that the clergy was the abiding depository of everything that was necessary and proper for the good life. "The preachers [of New England]," a contemporary observer remarks, "by their power with the people made all the magistrates, and kept them so entirely under obedience that they durst not act without them. So that whenever anything strange and unusual was brought before them, they would not determine the matter without consulting their preachers."¹⁸ This was especially true for all decisions touching upon law and government. The "word of God," as understood and interpreted by the New England divines, became the "fundamental law" of the land and the basis of all administration of justice: "The Ministers advise in

17 1 WINTHROP, HISTORY OF NEW ENGLAND 324 (Hosmer ed. 1908).

18 MSS LAMBETH, 3 PERRY, HISTORICAL COLLECTIONS 48 (1871).

making of Lawes," Thomas Lechford reports in 1642, "and are present in Court, and advise in some speciall causes . . . and in framing of Fundamentall Lawes."¹⁹ Lechford's observation was in keeping with an order of 1636 that "none among us shall sue at the lawe before Mr. Henry Vane [the Governor] and the two Elders have had the hearing and desyding [deciding] of the cause if they cann."²⁰

Soon it was feared, however, John Winthrop observes, "that our magistrates, for want of positive laws, in many cases might proceed according to their discretion" ²¹ Hence "it was agreed that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which, being allowed by some of the ministers, and the General Court, should be received for fundamental laws."²² At the meeting of the General Court held on May 25, 1636, it was therefore "ordered that the Governor [Henry Vane], the Deputy Governor [John] Cotton, Mr. Peters and Mr. Shep[h]ard are entreated to make a draught of laws agreeable to the word of God which may be the Fundamentals of this Commonwealth" ²³ In the interim period, the courts were to decide cases "as neere the law of God as they can."²⁴

As might have been expected, the "draughting" of these Fundamentals was entrusted to two Puritan divines, the Reverend John Cotton and the Reverend Nathaniel Ward. In 1636 John Cotton produced a kind of model code which Governor Winthrop called "a model of Moses, his judicials, compiled in an exact method."²⁵ This code was exclusively based on the Scriptures and aimed at nothing less than the establishment of an absolute and pure theocracy. Nathaniel Ward, who had been a barrister at Lincoln's Inn before he joined the ministry, in 1639 framed a more suitable and practical code, probably on account of his legal training. Ward's code, officially adopted in 1641

19 LECHFORD, *Plaine Dealing, or, News from New England*, 3 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 83 (3rd Series 1833).

20 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 175 (Shurtleff ed. 1853).

21 1 WINTHROP, *op. cit. supra* 151.

22 *Ibid.*

23 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 175 (Shurtleff ed. 1853).

24 *Ibid.*

25 1 WINTHROP, *op. cit. supra* 196.

and called *Body of Liberties* (a title which might be expected from a former barrister), was the first American law book, though, to a large extent it also relied on the Scriptures. It provided, as a uniform directive, that wherever the law was silent, the court and magistrates should be guided by "the word of God" rather than by the common law of England. To clarify this particular point once more, the General Court in 1644 inquired of the Elders whether it should base its decisions on "the word of God" in all those instances which had not been provided for by express statute: "We do not find," the Elders replied by referring to Ward's code, "that by the patent they [the courts] are expressly directed to proceed according to the word of God; but we understand that by a law or liberty of the country, they may act in cases wherein as yet there is no express law, so that in such acts they proceed according to the word of God."²⁶

It is not surprising, therefore, that many of the early Massachusetts statutes should be in flat contradiction to the rules and principles of the English common law, which, after all, was not considered as binding *ipso facto*, but only in so far as it was thought to be expressive of the "word of God" or of a Massachusetts statute. In early litigations citations from the Scriptures abounded and "[a] pertinent quotation," John Noble observes, "seemed sometimes decisive in settling a disputed point. Possibly there was sometimes a readier acquiescence in an opinion of Moses than in one of the Lord High Chancellor."²⁷ It needs no comment that such a situation, which bordered on what frequently is referred to as "justice without law," called for astute theologians rather than trained lawyers.

Perhaps a significant incident may be cited here. In 1647 the General Court ordered the importation of two copies of each of the following books: *Coke's Reports*, *Coke upon Littleton*, *Coke on Magna Charta*, Dalton's *Justice of the Peace*, the *Book of Entries*, and *New Terms of the Law*. The purpose of ordering these works was "to the end that we may have better light for making and proceeding about laws."²⁸ But if there is anything certain it

²⁶ 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 93 (Shurtleff ed. 1853).

²⁷ NOBLE, *Early Court Files of Suffolk County*, 3 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS 324 (1895-1897).

²⁸ 3 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 193 (Shurtleff ed. 1854).

is that in 1647 Massachusetts was not being governed in accordance with the common law of England and that it had no intention of being so governed. The use of these books, therefore, was subsidiary and supplementary: the common law of England was a system which, together with other systems, was to be examined for possible guidance, but it certainly did not control. This becomes quite manifest in 1650, when the same General Court declares: "And for as much as there are already many good laws made and published by our own land and the French nation and other kingdoms and commonwealths . . . the said laws printed and published in a book called *Lex Mercatoria* shall be perused and duly considered, and such of them as are approved by this court shall be declared and published to be in force in this jurisdiction."²⁹ There exists no record that any part of Gerard Malynes' *Consuetudo vel Lex Mercatoria* was actually "published and declared to be in force" in Massachusetts. But it should be noted that this work, a private treatise, is described here as a book of laws quite as much as any definite report of English cases or any list of English statutes. It should also be kept in mind that the professed basis of the *Lex Mercatoria* was natural law and natural reason.

Nathaniel Ward, in a sermon delivered in 1641, vainly proposed that the magistrates and divines "should not give private advice, and take knowledge of any man's cause before it came to public hearing."³⁰ His suggestion and admonition were roundly rejected with the remark that the adoption of such a measure would necessitate lawyers in the Commonwealth to direct and advise men in their causes. The jealous divines naturally were unwilling to share the control over the community with another learned profession. On account of this religious prejudice and jealousy, Washburn comments, "there does not appear to have been a class of learned lawyers or of men exclusively devoted to that profession at any time during the colonial charter [1630-1684]."³¹ In other words, the period between 1630 and 1684, and even beyond, was in Massachusetts, as elsewhere, a time in which the Colony attempted to carry on its affairs without a stable body of laws — a period, moreover, which saw the ad-

²⁹ *Id.* at 252.

³⁰ WINTHROP, 2 HISTORY OF NEW ENGLAND 37 (Hosmer ed. 1908). Cf. WARREN, 1 HISTORY OF HARVARD LAW SCHOOL 13 (1908).

³¹ WASHBURN, JUDICIAL HISTORY OF MASSACHUSETTS 53 (1840).

ministration of justice without professional lawyers, either on the bench or at the bar. It might be interesting to observe here that justice without law and justice without lawyers, of necessity seem to go hand in hand.

The early Massachusetts judicature, in a way, was as primitive as early Massachusetts law. For instance, during the first three years of the Plymouth Colony [1620-1623], the whole community constituted "the court." The first articulate provision for a more adequate judiciary was passed in 1623 when trial by jury was introduced. In 1632, the General Court was established which acted both as a legislative body and a court of law, together with the Court of Magistrates (or Assistants) which was presided over by the Governor. When in 1685 the County Courts were introduced, the Court of Magistrates became a court of appeal and of admiralty jurisdiction. None of these Magistrates or Assistants, as far as we know, were trained lawyers. In 1691, the special history of the Plymouth Colony ceases; for the colony, which never really flourished, was absorbed by the larger and more powerful Massachusetts Bay Colony.

In the Massachusetts Bay Colony the Governor, the Deputy Governor and eighteen Assistants formed the "Court" which down to the year 1635 was both a court of justice and the legislature. In 1635 the General Court was established, consisting of the Representatives of all free men in the colony, the Governor and the Assistants. This General Court, which from 1635 to 1684 acted both as legislature and judicial court of appeals, "is the chief civil power in the Commonwealth. . . . [I]t may act in all affairs of this Commonwealth according to such power, both in matters of counsel, making of lawes and matters of judicature" ³² In addition, the Court of Assistants, as a separate court, sat four times a year and, hence, was called the Quarter Court. In 1638 the town magistrates obtained jurisdiction in petty cases, and in 1639 the County Courts were set up with five magistrates and associates selected by the General Court.

The first attempt to distinguish between the jurisdiction of the General Court and the Court of Assistants was made in 1642, when it was also decided that civil cases should first be heard in the lower courts, including the Court of Assistants, with an appeal to the General Court. But only in 1660 did the Court of

³² *Id.* at 27.

Assistants become a truly separate and, hence, judicial court with specified powers prescribed by statute. In 1686 the Superior Court was created, composed of a majority of the Governor's Councillors. Also, three judges were appointed, but none of them were trained lawyers. As a matter of fact, down to the American Revolution the ten Chief Justices of Massachusetts, barring a few exceptions (Benjamin Lynde, the Elder, 1728-1745; Paul Dudley, 1745-1751; and Benjamin Lynde, the Younger, 1771-1772), were laymen, that is, clergymen, physicians, tutors at Harvard College, merchants, literary men, or plain "gentlemen." Of the twenty-three associate justices only two were English barristers, and only three others had received regular legal training. The Court of Special Oyer and Terminer, established in 1692 to try people for witchcraft, to mention another example, reads like the contemporary social register of Massachusetts rather than a court of law: William Stoughton, the Chief Justice, and judge Samuel Sewell were divines; judges Waite Winthrop, Jonathan Curwin and Anthony Checkley, the Attorney General, were wealthy merchants or military men, while judges Nathaniel Saltonstall and Peter Sargeant were plain "gentlemen of leisure."

In 1691, the year the Massachusetts Bay Colony absorbed the Plymouth Colony, Massachusetts was granted a new royal charter (the old charter had been revoked in 1684); and in 1699 the King finally approved an Act of the Colony which established a Superior Court of Judicature as well as inferior courts. Also, the courts were empowered to set up rules for the regulation of practice. This Act marks the beginning of a more regular and satisfactory judicature in Massachusetts.

Thus only by the end of the seventeenth century did Massachusetts establish something resembling a real system of courts to administer justice according to law. The judicature became more fully distinguished from the legislature and the executive. The judges, however, continued to hold their commission "at the King's pleasure"; they were appointed by the Royal Governor who, in turn, was still under the influence of the dominant Puritan clergy. And the New England clergy was still strongly opposed to the appointment of professional men.

As regards the forms of procedure, the early Massachusetts courts or magistrates followed very much their own intuition and ideas in conducting a trial, although there were instances where the practices of English law were observed. Throughout the sev-

enteenth century the proceedings were simple and often summary. The magistrates, cast in the role of judge, prosecutor and attorney, frequently assumed a patriarchal attitude. Testimony was given in open court and written down in the form of a deposition. The court, as a rule, questioned the witnesses or the parties, and little attention was paid to forms of action. In 1681, for instance, Judge Stoughton informed the Governor of Plymouth Colony that "according to our practice, in this jurisdiction [scil., Massachusetts Bay Colony], we should punish him [scil., the defendant who had been found "not guilty" of a capital charge] with some grievous punishment, according to the demerit of his crime, though not found capital." It appears that on a verdict of "not guilty," in a capital crime, any member of the court could rise and charge the prisoner with some other crime, and have a new trial ordered immediately on such a charge. In short, legal proceedings often completely lacked such decisive safeguards as consistent rules of evidence, impartiality of the court, elaborate legal formalities, the chance of calling upon the assistance or advice of a trained lawyer and, above all, the presumption of the innocence of the accused until proven guilty. Nevertheless, except in cases where religious, moral or political prejudices came into play, an atmosphere of equitable justice frequently prevailed.

That under such general conditions there was little if any need for experienced lawyers trained in the law, should be quite obvious. As long as the Holy Writ and the personal theological convictions of fanatical New England divines were the sole guides and authorities in all matters of law and procedure, and as long as the parties spoke, and wished to speak for themselves, there was no room for a true legal profession: "For more than the ten first years," Hutchinson reports, "the parties spake for themselves. . . . Sometimes . . . they were assisted by a patron, or man of superior abilities, but without fee or reward."³³ This "patron" usually was a magistrate or a divine. It has already been shown that when in 1641 the Reverend Nathaniel Ward made the suggestion in a sermon that magistrates should refrain from advising litigants or acquainting themselves with the case before it came to trial before them, his sensible proposal was

³³ HUTCHINSON, 1 HISTORY OF COLONY AND PROVINCE OF MASSACHUSETTS BAY 381 (Mayo ed. 1936).

turned down with the remark that without such advice the parties would have to resort to lawyers — certainly a most undesirable result. This reprehensible practice was somewhat corrected by the admission of paid lawyers: the *Laws and Liberties* of 1648 omitted the stipulation in the *Body of Liberties* of 1639 that a lawyer may not receive remuneration. Hence by 1648, at least *sub silentio*, the paid attorney was recognized.

The first lawyer in Massachusetts, in the Plymouth Colony to be exact, appears to have been a certain Thomas Morton who came to America in 1624 or 1625. Although he claimed to have been a member of Clifford's Inn (an Inn of Chancery), Governor Bradford referred to him as "a kind of pettifogger from Furnewells Inne" (Furnival's Inn likewise was an Inn of Chancery); and Governor Dudley, probably without justification, called him "a proud and insolent man." The New England divines, prompted by suspicion and jealousy, disposed of him in short order. He was charged with maintaining at his place Merry Mount (the very name must have been an abomination to the Puritan clergy), near present-day Quincy, "a school of Atheisme," with having composed scandalous "rhymes and verses," and with quaffing "strong waters . . . as if they had anew revived and celebrated the feast of ye Roman Goddes Flora or ye beastly products of ye madd Bacchanalians" — all very serious crimes in the eyes of the austere divines. Although he was probably nothing more than a jolly fellow who enjoyed life, if life could be enjoyed in early Massachusetts, he was thrown in jail in 1628 and soon afterwards shipped out.³⁴ Not much more successful was Thomas Lechford of Clement's Inn, who alighted in Boston in 1638. In England he had been a mere solicitor: "I am no pleader by nature," he informed the colonial magistrates, "oratory I have little." In the beginning he tried to support himself as a scrivener by "writing petty things," but when he started to expand his practice to counselling and advocacy, he seems to have met with serious trouble. In 1639 the Quarter Court ordered that "Mr. Thomas Lechford for going to the Jewry [jury] and pleading with them out of court is debarred from pleading any man's cause thereafter unless his owne, and admonished not to presume to meddle beyond what he shall be

³⁴ As to Thomas Morton, *cf.* in general, ADAMS, *THE NEW ENGLISH CANAAN OF THOMAS MORTON, INTRODUCTION* (1883). This Introduction contains valuable biographical data concerning Thomas Morton.

called to by the court." As a matter of fact, in one case Lechford had tried to influence the jury out of court. He freely acknowledged his offense in a petition to the General Court, being "so much more inexcusable . . . inasmuch as he knew it was not to be done by the law of England." The General Court thereupon allowed him to return to his profession, presumably under the condition that he would not practice advocacy for money. But the animadversion of the Puritan clergy apparently was relentless. In 1640 he was again summoned before the Quarter Court where he admitted that "he had overshot himself, and was sorry for it, [and] promised to attend to his calling [presumably to writing "petty things"], and not to meddle with controversies."³⁵

This abiding hostility to lawyers is rather surprising in view of the fact that Winthrop, Dudley, Bellingham, Humphrey, Downing, and perhaps Pelham and Bradstreet had all been students of the law in England, although they made no direct use of their legal training in America. Thoroughly disgusted and without hope of ever being able to establish a legal practice in the face of so much opposition, Thomas Lechford took his departure and returned to England in 1641. He probably realized that he had come to Massachusetts at a period of history when the colony was determined to administer justice without law and without lawyers. Subsequently he wrote about New England and his experiences there. He assumed, and rightly so, that his difficulties with the Massachusetts authorities had been caused primarily by his efforts to introduce the common law of England, while the Massachusetts courts, as he put it, were trying to set up the Law of Moses. "I feare," he concluded, "it is not a little degree of pride and dangerous improvidence to slight all former lawes . . . cases of experience and precedents . . . upon pretence that the Word of God is sufficient to rule us."³⁶ Nevertheless, he seems to have done the Colony a great and lasting service, though perhaps inadvertently. For it was at his suggestion that in 1639 an act was passed that court records should "bee kept for posterity" of "every judgment with all the evidence" to "bee of good use for president [precedent] to posterity."³⁷ Here we

³⁵ About Thomas Lechford and his experiences, see LECHFORD, *Plaine Dealing, or, Newes from New England*, 3 COLLECTION OF THE MASSACHUSETTS HISTORICAL SOCIETY, (3d Series, 1833). Cf. TRUMBULL, *TRANSACTIONS AND COLLECTIONS OF THE AMERICAN ANTIQUARIAN SOCIETY* (1885).

³⁶ LECHFORD, *op. cit. supra* at 85.

³⁷ 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 275 (Shurtleff ed. 1853).

can see the influence of the English lawyer who believed in the importance of the *Year Books* and the doctrine of *stare decisis*. Lechford also was employed to transcribe the breviats of Ward's *Body of Liberties*, and it may well be that in the transcription he did some editing. For he was not one to withhold his legal talents. If this is so, the *Body of Liberties* bears the imprint of a legal mind other than that of Nathaniel Ward. Lechford might have been responsible for Article 26 of the *Body of Liberties*, which provided: "Every man that findeth himself unfit to plead his owne cause in any Court shall have Libertie to employ any man whom the Court doth not except to help him, Provided he give him noe fee or reward for his paines." Although this provision remained in force only for a short time, it seems to acknowledge the right of every litigant or defendant to request legal assistance of his own choice. But it does not appear from the extant records that as a result of this rather liberal provision there emerged in Massachusetts during the period of the colonial charter [1630-1684] a class of learned lawyers or of men exclusively devoted to the practice of law. By 1692, the year Massachusetts began to introduce important and far-reaching judicial reforms, there was, in the words of Washburn, not a man in the province "who had been educated to the bar."³⁸

The tragic result of the complete absence of any trained or proficient lawyer in Massachusetts was that all sorts of unqualified and unscrupulous persons began to act as agents for litigants and even as trial lawyers whenever the opportunity arose. Attorneys of some sort are referred to in the records of the General Court as early as 1649. The records indicate that prior to 1686 John Coggan, a merchant; John Watson, formerly a London merchant; Bullivant, a physician and apothecary; and Anthony Checkley, a merchant, on occasion acted as attorneys.³⁹ In all likelihood some of these attorneys were the persons whom Governor Winthrop had in mind when he referred to "mean men." Although they apparently possessed little or no knowledge of the law, they were, on occasion and by special leave or perhaps by judicial request, admitted to the court. But their "mean-ness" seems to have been somewhat curbed by a statute, passed in 1656, which prohibited them "by reason of the many and

³⁸ WASHBURN, *op. cit. supra* at 148.

³⁹ *Id.* at 51, *Cf. id.* at 88.

tedious discourses and pleadings in court," to plead for more than one hour under penalty of twenty shillings for every excess hour.⁴⁰ Also, the statute took unfavorable notice of "the readiness of many [attorneys?] to prosecute suits in Law for small matters." Finally, in 1663, a statute was enacted forbidding any "usual and common attorney in any Inferior Court" to sit as Deputy in the General Court because it was not deemed proper that a person who had acted as attorney for a party in the inferior court should, as a member of the General Court, pass on the appeal of a case which he himself had previously handled.

John Adams, whose *Diary* is a splendid source of information about the Massachusetts legal profession, describes vividly these "mean men" or pettifoggers. He tells us that in 1760 he found in Braintree "a multitude of pettifoggers . . . who stirred up dirty and ridiculous litigation."⁴¹ Then he gives an intimate picture of the typical pettifogger, a tavern keeper called Kibby: "In Kibby's barroom, in a little shelf within the bar, I spied two books . . . Every Man His Own Lawyer and Gilbert on Evidence. . . . [T]he people there told me that Kibby was a sort of lawyer . . . [who] pleaded some of their home cases before justices, arbitrators, etc."⁴²

To its own detriment, Massachusetts, like most of the other colonies, was gradually experiencing a great lesson of history: it learned in a hard and painful way the futility of forbidding representation in litigation as well as the utter wastefulness and inefficiency of the principle that every man ought to be his own lawyer, especially since the Massachusetts colonists were extremely litigious people. It was this litigiousness which in 1673 compelled the legislature to pass an act which provided that any person might sue "by his lawful Attorney Authorized under his Hand and Seale, and legally proved to be his Act and Deed"⁴³ in any court. But Massachusetts also found out that the suppression of trained and responsible lawyers, a suppression which is but the consequence of forbidding representation in litigation or of expecting that every man ought to be his own lawyer, invariably invites the growth of a class of irresponsible and inept

40 1 WARREN, *op. cit. supra* at 16. Cf. WASHBURN, *op. cit. supra* at 53.

41 2 WORKS OF JOHN ADAMS 90 (1851).

42 *Id.* at 271.

43 BENTON, *THE LAWYER'S OFFICIAL OATH AND OFFICE* 57 (1909).

spellbinders and pettifoggers who prey upon the unsuspecting and ignorant.

The sad experiences of one William Colman, tried in 1687-89 for an alleged violation of the excise law before John West who acted as judge of the Court of Sessions, illustrate this point well:

. . . the packed Jury, [Colman narrates], received the charge from the Judge, brought me endebted to the King £5, and Justice Bullivant sent for me a few days after and demanded £8 1 shilling, refusing to give me a bill of costs. I was forced to pay him £5 and £3 1 shilling costs. . . . [O]n Monday after Larkin arrested me for £20 more that I should be endebted to the King. I was forced to give bail, but could not procure a copy of the writ. I went to the Sheriff but he refused to give me a copy. I searched all the offices for the original writ, but none [was] to be found. . . . [W]hen the case was called . . . no time would be granted me for to answer. . . . I had two Attorneys, Masters and King, but Judge West so handled the matter in giving the charge to the Jury that they brought me in debt to the King £16 Os. 6d. . . . I was advised to carry the case to The Superior Court. I did so and Masters and West had £8 12s of me to bring it there, and that morning the Court came, Masters had 48 shillings of me and told me it was to enter the action, and make up the record. But when it came to be pleaded, Judge Dudley . . . would admit of no plea, but said it was the King's business and so confirmed the former Judgment. Immediately then came Faywill upon me for costs as the King's counsel, for so he termed himself, and demanded of me £8 12s. My bill of costs that he sent me, was in Latin. What it was I cannot tell, and the bill of costs was signed by Judge Palmer, and yet he was not in the country when the cause was tried. Then comes Thomas Dudley and he demanded of me 28 shillings, the which he called his fees, but would give me no account what is was for, I was forced to pay it. The whole which had been so injuriously forced from me, amounts to the sum of £45 1s. 6d.

Edward Randolph, Secretary to Governor Andros, describes this situation in a letter dated 1687: "We have but two [attorneys] here; one West's creature — came with him from New York, and drives all before him. He also takes extravagant fees, and for want of more [attorneys], the country cannot avoid coming to him so that we had better be quite without them. . . ." ⁴⁴ And John Adams, who attempted to combat this serious situation in Massachusetts, as late as 1759 reports about some actual

⁴⁴ WARREN, *op. cit. supra* at 18.

situations which had arisen "when deputy sheriffs, petit justices, and pettifogging meddlers attempt to draw writs and draw them wrong more oftener than they do right."⁴⁵ "Looking about me in the country," John Adams continues, "I found the practice of law grasped into the hands of deputy sheriffs, pettifoggers and even constables who filled all the writs upon bonds, promissory notes and accounts, received the fees established for lawyers, and stirred up many unnecessary suits."

This deplorable situation for awhile was further aggravated — and probably also stimulated — by the fact that the uncontrolled use of paper money and the subsequent depreciation of the currency between 1704 and 1741 caused many serious troubles which, in turn, led to innumerable law suits. But these are the very conditions under which the reprehensible type of attorney flourishes. William Shirly, in 1743, reported to the Board of Trade: "It was not infrequent for persons . . . to suffer judgment to be given against them by default in open court for such debts, and to appeal from one court to another merely for delay; whereby law suits were scandalously multiplied. . . ."⁴⁶ And John Adams, in 1756, complains that when the spellbinding type of lawyer "gets into business, he often fomenters more quarrels than he composes, and enriches himself at the expense of impoverishing others more honest and deserving than himself."⁴⁷

The courts, to be sure, tried to stem these abuses by resorting to certain restrictive measures which, however, turned out to be half-hearted. In 1692 they were empowered by the Judicature Act of the same year (but disallowed by the Privy Council in 1695) to make certain rules for the regulation of the practice of law before them. In particular, they were to see to it that every plaintiff or defendant in any court might "plead or defend his own cause in his proper person, or with the assistance of such other as he shall procure, being a person not scandalous or otherwise offensive to the court."⁴⁸ In 1697 a further Judicature Act was passed (also disallowed by the Privy Council in 1698) which contained the provision that "attourney's fees to be allowed at the superior court of judicature shall be twelve shillings and at

⁴⁵ 2 J. ADAMS, *op. cit. supra* at 58, and the footnote thereto.

⁴⁶ HOSMER, *LIFE OF THOMAS HUTCHINSON* 20 (1896).

⁴⁷ 2 J. ADAMS, *op. cit. supra* at 58.

⁴⁸ 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 75 (1692-1714).

the inferior court ten shillings and no more; and but one attourney to be paid for in any case."⁴⁹ It is doubtful, however, whether these restrictions on "attourney's fees" were effective in curbing the activities and the rapaciousness of the pettifoggers.

The attorney's oath, as it was administered in England since 1402, was adopted in Massachusetts in 1686 in the hopes of eliminating pettifoggers:

You shall Swear That you will Do no falsehood nor deceit nor shall Consent to any to be done in this Court and if you know of any to be done you shall give knowledge thereof to the Judge of this Court for the time being or some other of his Majestyes Councill or assistants of this Court that it may be reformed. You shall delay no man for Lucre and Malice. You shall increase no fees but be Contented with such fees as are by order of Councill or the Judge of this Court allowed you, in time to come you shall plead no plea nor sue any suits unlawfully to hurt any man but such as shall stand with the Order of the Law and your Conscience. You shall not Wittingly or Willingly sue or procure to be sued any false suit or give Aid or Consent to the same on pain of being expelled from the Court for Ever and further you shall use and Demeane yourselves in the office of Attourneys within the Court according to your Learning and discretion.⁵⁰

In 1686, under the new oath of office, Giles Masters, Anthony Checkley, John Watson, Nathaniel Thomas and Christopher Webb were admitted to practice as attorneys. Subsequently, they were joined by Thomas Newton, King (a bookseller in Boston), Samuel Hayman, George Farwell (probably the attorney to whom Edward Randolph refers to as "West's creature" in 1687), John West, James Graham, Joseph Hearne, Otis Little, Elisha Bisbee, and probably others.

The admission of attorneys to practice in Massachusetts, on the whole, followed the traditional English method. Each court admitted its own attorneys to practice before it. Under this system the highest court tended to restrict its own bar more severely than did the lower courts, with the result that there developed something like a "graded profession." This is clearly brought out by the reminiscences of John Adams who refers to lower court attorneys and barristers. Admission to practice, especially the taking of the oath of office, in later years created

⁴⁹ *Id.* at 287.

⁵⁰ BAILEY, ATTORNEYS AND THEIR ADMISSION TO THE BAR OF MASSACHUSETTS 13 (1907).

among the better attorneys a strong feeling of membership in a single bar, rather than a mere license to practice law. This, too, is evident from John Adams' account of his admission to practice in 1758:

In open Court Gridley [the leader of the Boston bar, *note by the author*] said: 'May it please your Honor, I have two young gentlemen, Mr. Quincy and Mr. Adams. . . . Mr. Adams has lived between two and three years with Mr. Putman of Worcester [James Putman was rated very highly among contemporary lawyers, *note by the author*], and that he has made a very considerable, a very great proficiency in the principles of the law, and therefore, that the clients' interests may be safely entrusted in his hands, I therefore recommend him with the consent of the Bar, to Your Honor for the oath. . . .' [A]fter the oath. Mr. Gridley . . . recommended me to the Bar. I shook hands with the Bar and received their congratulations. . . .⁵¹

The fact that the leader of the local bar recommended the two candidates "with the consent of the bar," is of special interest. It should also be noted here that any barrister who had been "called to the bar" by his Inn of Court in England, was automatically admitted to practice in late colonial Massachusetts.

Apparently there was no definite statute dealing with the formal admission of attorneys to practice until 1701 when it was provided that, "All attournys, commonly practising in any of the courts of justice within this province shall be under oath, which oath shall be administered to them by the clerk in open court before the justices. . . at the time of their being admitted to such practice. . . ."⁵² The oath was essentially the same as the one prescribed in 1686, with the significant addition that "you shall use yourselfe in the office of an attourney . . . with all good fidelity as well as to the court as to your clients."⁵³ Maximum attorney's fees again were established at twelve shillings "in the superior court of judicature . . . and in the inferior court of common pleas ten shillings."⁵⁴ It also appears that after 1701 attorneys were regarded as officers of the court. In 1785, a further act was passed providing that, "No person shall be admitted as

⁵¹ 1 WORKS OF JOHN ADAMS 49 (1851).

⁵² 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 467 (1692-1714).

⁵³ BAILEY, *op. cit. supra* at 13.

⁵⁴ 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 467 (1692-1714).

Attorney of any Court in this Commonwealth, unless he is a person of good moral character, and well affected to the Constitution and Government of this Commonwealth, and hath had opportunity to qualify himself for the office, and hath made such proficiency as will render him useful therein. . . ."⁵⁵

During the second half of the eighteenth century, in Massachusetts as elsewhere, the bar became better organized and conscious of its power and influence. Apparently, when any skilled profession attains power and influence, it has the tendency to perpetuate itself by a variety of means which frequently amount to a veritable policy. First, it devises a definite and, wherever possible, a strictly supervised system of training and education in order to replete its ranks and maintain high professional standards; secondly, it tries to gain complete control over the admission to the practice of the profession in order to keep out undesirable persons; thirdly, it protects itself against unwanted competition by monopolizing its skilled services; and fourthly, it attempts to enhance its standing and prestige within the community through the establishment of a definite and, as a rule, strictly enforced code of professional ethics. The beginnings of such a planned policy can already be discerned in the late colonial bar of Massachusetts which, around the middle of the eighteenth century, commenced to establish certain rules and requirements as to the preparation for and admission to the practice of law. These regulations, which were devised by the local bar of Boston or Suffolk and, hence, lacked official recognition, nevertheless had practical efficacy in that their disregard deprived a candidate of the "recommendation of the bar" for his admission. In addition, in the course of time they led not only to the establishment of regular law schools with regular curricula, but also caused the colonial lawyer, especially the Massachusetts lawyer, to become progressively a more thoroughly educated man. In 1771, for instance, the Suffolk Bar in Massachusetts required that "the consent of the Bar shall not be given to any young gentleman who has not had an education at college, or a liberal education equivalent in the judgment of the Bar."⁵⁶ Subsequently, these standards of admission were raised still further — candidates were rejected by a committee appointed by the bar to ex-

⁵⁵ LAWS AND RESOLVES OF MASSACHUSETTS, c. 23 (1785).

⁵⁶ WARREN, *op. cit. supra* at 155.

amine them, because "although [they] . . . were well versed in Latin and English classics," they were not sufficiently proficient in "mathematics, in ethics, logic, and metaphysics,"⁵⁷ subjects considered necessary for their admission. As a result of these rather exacting requirements and standards of admission, the reputation of the Suffolk Bar in particular was so high that many "out-of-state" students studied there rather than in one of the English Inns of Court.

The general scarcity of lawyers, especially good lawyers, which plagued the colonies, Massachusetts in particular; and the fear that one influential and rich litigant might try to retain all available legal talent to the prejudice and detriment of the adversary become manifest in a statute, enacted in 1715, which provided that "no person shall entertain more than two of the sworn allowed attorneys at law, that the adverse party may have liberty to retain others of them to assist him, upon his tender of the established fee, which they may not refuse."⁵⁸ This act, in essence, was repeated in 1785, when it was stated that "the plaintiff or plaintiffs . . . shall not be allowed to manage their cause by more than two Attorneys, nor shall any defendant be allowed to employ a greater number."⁵⁹ The act also reiterated the right of the parties "to plead and manage their own causes personally, or by the assistance of such counsel as they shall see fit to engage."⁶⁰ The act reflects the scarcity of lawyers caused by the exodus of many practitioners (among them Jonathan Sewall, Timothy Ruggles, Benjamin Kent, Benjamin Gridley, Andrew Cazeneau, James Putnam, Daniel Leonard, Pelham Winslow and Sampson Salter Blowers) who preferred to remain loyal to the British Crown and, hence, left Massachusetts.

By the end of the seventeenth century there was no trained lawyer in Massachusetts either on the bench or at the bar: "I have wrote you the want we have of two, or three honest attorneys. . . ," Edward Randolph, Secretary of Governor Andros, reported to England in 1687," [and] I have wrote Mr. Blackthwaite the great necessity of judges from England." Randolph could not foresee, however, that within a few years (in 1692) Benjamin Lynde, the Elder, of Massachusetts, who graduated

⁵⁷ *Id.* at 156, 197.

⁵⁸ *Id.* at 50.

⁵⁹ GENERAL LAWS OF MASSACHUSETTS c. 23 (1823).

⁶⁰ *Ibid.*

from Harvard in 1686, would be admitted "into the honorable Society of the Middle Temple," which together with the Inner Temple was to become the favored Inn of American-born students seeking a legal education in England. As far as known, Lynde was the first citizen of Massachusetts to be admitted to any Inn of Court, and his example was soon followed by others. Paul Dudley, the successor of Benjamin Lynde to the Chief-Justiceship in 1745, was graduated from Harvard in 1690 and was called to the bar of the Inner Temple in 1700; and John Gardner was admitted to the Inner Temple in 1761. Thus, beginning with the eighteenth century, the character, personnel and competence of the Massachusetts bar gradually began to improve. Aside from the influence of English trained lawyers, this improvement was due to the wholesome educational effects of Harvard College, which had been founded in 1636, as well as to the personal efforts of two outstanding lawyers, namely, Paul Dudley and Robert Auchmuty, the latter an English barrister who practiced in Boston as early as 1719. In addition, there were prominent lawyers of great ability such as Thomas Newton (admitted to practice in 1688) and Joseph Hearne (admitted in 1701). Around 1700 Thomas Newton was undoubtedly the leading lawyer in Massachusetts. He is given the credit of having been "a greater influence in molding the jurisprudence of the Colony than any of his contemporaries." It was he who more than anyone else took frequent recourse to the precedents and principles of the common law of England.

These men constituted the beginning of a small, though capable, bar in Massachusetts. They were soon joined by John Reed (Harvard 1697, admitted to practice in 1708), reputed to have been the greatest common law lawyer who ever lived in New England; Jeremiah Gridley (Harvard 1725), the "father of the Boston bar" and great legal scholar who became the mentor of such legal luminaries as James Otis, Jr., John Adams, Oxenbridge Thacher, Benjamin Pratt (later Chief Justice of New York), and William Cushing (later Chief Justice of Massachusetts and Associate Justice of the Supreme Court of the United States); Edmund Trowbridge (Harvard 1728), considered by some of his contemporaries the "most profound lawyer in New England before the Revolution," who, in the words of John Adams, commanded "the practice in Middlesex and Worcester" around the middle of the eighteenth century, and who became

the teacher of Francis Dana, Theophilus Parsons (both later became Chief Justices of Massachusetts), James Putnam, Royall Tyler (later Chief Justice of Vermont), Rufus King, Christopher Gore and Harrison Gray Otis; Richard Dana (Harvard 1718); Benjamin Kent (Harvard 1728); Samuel White (Harvard 1731); Samuel Fitch; Timothy Ruggles (Harvard 1732); and Benjamin Pratt (Harvard 1737), who became Chief Justice of New York in 1761. In addition, Robert Auchmuty, William Bollan and William Shirly, three English-born barristers, practiced law with distinction.

Somewhat later another distinguished group of lawyers added luster to the Massachusetts bar: Oxenbridge Thacher (Harvard 1738); John Chipman (Harvard 1738); Daniel Farnham (Harvard 1739); James Otis, Jr. (Harvard 1743); Jonathan Sewall (Harvard 1748); Samuel Adams (Harvard 1740); John Worthington (Yale 1740); Joseph Hawley (Yale 1742); William Pynchon (studied law under Sewall); and Robert Treat Paine (Harvard 1749, one of the signers of the Declaration of Independence). Shortly before the American Revolution a third group of lawyers rose to influence and distinction: Nathaniel Peaselee Sargent (Harvard 1750); Abel Willard (Harvard 1752); Samuel Quincy (Harvard 1754); William Cushing (Harvard 1751), who became the first trained lawyer in Maine in 1760 or 1761, and Chief Justice of Massachusetts in 1777; John Adams (Harvard 1755), who was admitted to the bar in 1758 and became the second President of the United States in 1797; Theophilus Bradbury (Harvard 1757); Daniel Leonhard (Harvard 1760); John Lowell (Harvard 1760), who studied law under Benjamin Pratt; Francis Dana (Harvard 1764); Sampson Salter Blowers (Harvard 1763); Josiah Quincy (Harvard 1763); Caleb Strong (Harvard 1764); and Theodore Sedgwick (Yale 1765).

John Adams (1735-1826), the constitutional lawyer, influenced the events which ultimately led to the American Revolution probably more than any other citizen of Massachusetts. It is said that the arguments of James Otis in the Superior Court of Massachusetts against the constitutionality of writs of assistance in 1761 inspired the young Adams with zeal for the cause of the American colonies. His political influence was first felt when he became conspicuous as a leader of the Massachusetts Whigs during the discussions of the Stamp Act of 1765. In that year

he drafted the instructions which were sent by the town of Braintree to its representatives in the Massachusetts legislature, and which served as a model for other towns in drawing up instructions to their representatives. In August 1765, he published four notable articles in the *Boston Gazette*, republished separately in London in 1768 as *A Dissertation on the Canon and Feudal Law*, in which he argued that the opposition of the colonies to the Stamp Act was a part of the never-ending struggle between individualism and corporate authority. In December 1765, he delivered a speech before the Governor and Council in which he pronounced the Stamp Act invalid on the ground that Massachusetts, being without representation in Parliament, had not assented to the act. In 1770, with that degree of unflinching moral courage which was one of his distinguishing characteristics, he, assisted by Josiah Quincy, Jr., defended the British soldiers who were charged with the wanton killing of four Boston citizens in the "Boston Massacre," thus displaying in this most unpopular incident utter devotion to the duties of his chosen profession. In 1771 he was elected to the Massachusetts House of Representatives, and from 1774 to 1778 he was a member of the Continental Congress. In June 1775, with a view to promoting the unity among the colonies, he seconded the nomination of George Washington as Commander-in-Chief of the Army. His influence in Congress was great, and almost from the beginning he was impatient for a separation of the colonies from England. On June 7, 1776, he seconded the famous resolution introduced by Richard Henry Lee that "these colonies are, and of right ought to be, free and independent states"; and no man championed these resolutions, which were adopted July 2, 1776, more eloquently and effectively before the Congress. On June 8, 1776, he was appointed to a committee together with Jefferson, Franklin, Livingston and Sherman to draft a "Declaration of Independence"; and although this document was written by Jefferson, by the request of the committee, it was John Adams who occupied the foremost place in the debate for its adoption. In 1778 he was elected a member of the convention which framed the Massachusetts Constitution adopted in 1780. In 1785 he was appointed the first of a long line of distinguished and able American ministers to the Court of St. James. In 1789 he became the first Vice-President of the United States; and in 1796, on the refusal of Washington to accept another election, was elected to the

Presidency of the United States, serving from 1797 to 1801.

In Massachusetts during the eighteenth century there were apparently three different ranks in the legal profession. In any event, John Adams was admitted to practice in the lower courts in 1758, became an attorney in the Superior Court in 1761, and soon thereafter was called a barrister. The distinction between attorney and barrister was introduced by Chief Justice Hutchinson in 1760 or 1761 by a rule of court; and only barristers were to be admitted to practice before the Superior Court. In 1768 there were twenty-five barristers in Massachusetts; and sixteen additional attorneys, among them John Adams, were raised to this rank prior to the American Revolution. At the time of the Revolution there were altogether thirty-six barristers. Three (later seven and finally two) years of practice as an attorney were required before a man could be promoted to the rank of barrister. With the Revolution, however, the distinction between barrister and attorney was abolished in Massachusetts, probably due to the fact there were not enough lawyers to permit a continuation of this division of labor, or perhaps because this distinction smacked too much of English customs.

During the last half of the eighteenth century the legal profession in Massachusetts, as it did in most of the other colonies, became fairly well established. It was, in the main, highly educated and, on the whole, enjoyed public esteem and confidence. This wholesome development, at least in Massachusetts, to no small degree was due to what might be called "bar meetings"—a forerunner of the regular local bar associations of a later date. These bar meetings, which in a sense followed the idea of the New England town meetings, were fairly regular affairs which brought together the whole local bar and not merely the bar of a particular court. Apparently the "bar associations" which were scattered throughout New England sometimes encompassed several counties: for instance, the bar association in Massachusetts which can be traced back to the year 1761, the association in Essex County of 1768 and the association in Boston of 1770. The Suffolk bar in 1771 sought successfully to extend its influence and activities to the entire Province by the familiar device of a Committee of Correspondence. John Adams, reminiscing about his own experiences with these bar meetings, reports that "[m]any of these meetings were most delightful. . . . The spirit that reigned was that of solid sense, generosity, honor and in-

tegrity; and the consequences were most happy for the courts and the bar."⁶¹ The results were so wholesome for bench and bar that Benjamin Pratt, when taking leave from his fellow lawyers in Massachusetts to assume the office of Chief Justice of the Supreme Court of New York in 1761, gave the following parting advice: "Brethren, above all things, forsake not the assembling of yourselves together."⁶²

In 1759, John Adams, according to his *Diary*, proposed at one of these bar meetings that certain steps be taken for the improvement of the conditions of the profession: "I asked them why some measures might not be agreed upon at the bar, and sanctioned by the court. . . . They thought it not only practicable, but highly expedient, and proposed a meeting of the bar to deliberate upon it. A meeting was called and a great number of regulations proposed."⁶³ Most of these proposals were concerned with John Adams' attempt to curb the evil practices of the pettifoggers who still plagued Massachusetts: "I mentioned these things to some of the gentlemen in Boston," Adams writes, "who disapproved and even resented them very highly."⁶⁴ Aside from deliberating and devising means and ways for the improvement of the profession, these meetings also dealt with matters affecting the bar more immediately; consent was given to members of the profession for taking in clerks; suggestions were made to the courts concerning certain rules; and improvements of the law through legislation were proposed. In addition, these bar meetings also passed regularly on recommendations to the court for admission to practice. Perhaps the leading members of the Massachusetts bar had in mind the famous statement of Francis Bacon: "I hold every man a debtor to his profession, from which, as men of course do seek to receive countenance and profit, so ought they of duty endeavor themselves to be a help and an ornament thereunto."

In order to promote a better understanding of the intricacies of the law, a small group of prominent Massachusetts lawyers, among them the ever-energetic John Adams, founded "The Sodality" in 1765, a sort of law club formed for the purpose of

61 2 WORKS OF JOHN ADAMS n. 58 (1856).

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

reading the Appendix of Gothofredus' edition of the *Corpus Juris*, Cicero's forensic orations, *Coke upon Littleton* and the major English Statutes reign by reign. The aim of The Sodality was expressed in the following statement: "Let us form our style upon the ancient and best English authorities. I hope, I expect to see at the Bar, in consequence of this Sodality, a purity of eloquence, and a spirit surpassing anything that has ever appeared in America"⁶⁵ — certainly a noble aim for any local bar. The effects of this eloquence and spirit were soon to become manifest in the American Revolution where Massachusetts lawyers, especially John Adams, were to play an important role.

At first, Massachusetts did not insist on special qualifications or a fixed period of study as prerequisites for admission to the practice of law, except "good character" and adherence to the laws of the colony. But by the middle of the eighteenth century, due to the emergence of a competent and well trained bar, all this changed radically. "A lawyer in this country," Jeremiah Gridley informed John Adams in 1758, in order to master the skills and possess the required knowledge necessary for the successful practice of law, "must study common law and civil law and natural law and admiralty and must do the duty of a councillor, a lawyer, an attorney, a solicitor and even a scrivener; so that the difficulties of the profession are much greater here than in England."⁶⁶ However, these qualifications, as can well be imagined, were not enforced by the courts or by statute. They were the considered opinion of the energetic and competent Massachusetts bar which could refuse to recommend for practice to the court any person who fell short of these requirements. In 1761 the bar meeting prescribed three years of study, two years of practice as an attorney in the lower courts, and two years of practice before the Superior Court before a lawyer could become a barrister. And in 1771, as has been shown, the bar decided not to recommend for practice any candidate unless he had a college education or its equivalent.

III. CONNECTICUT

Early colonial Connecticut, like its influential neighbor Massachusetts, took a dim view of the common law of England. This

⁶⁵ *Id.* at 149.

⁶⁶ *Id.* at 46.

attitude is perhaps best expressed in a resolution of the New Haven settlement, dated 1639: ". . . the words of God shall be the onely rule to be attended unto in ordering the affayres of government in this plantation." Or, as Jesse Root phrased it in the preface to his *Reports*, the common law of England was only "adapted to a people grown old in the habits of vice," while the law which the courts of Connecticut administered "was derived from the law of nature and of revelation,"⁶⁷ — words which very well could have been uttered in Massachusetts. This essentially "theological" or theocratic approach to law, however, was somewhat mitigated by the fact that in the same year the *Fundamental Orders* — the first written American constitution — were composed by Roger Ludlow, an Oxford graduate and student at the Inner Temple (1612), who prior to his migration to Connecticut had been a member of the Court of Assistance in Massachusetts. In keeping with his English training, Ludlow preserved some vestiges of the common law of England. In 1650, at the request of the General Assembly, Ludlow prepared a *Body of Lawes* in seventy-seven sections, fourteen of which were taken from the Massachusetts *Body of Liberties* (composed by Nathaniel Ward and adopted in 1641); the remainder, not devoid of originality, was the product of Ludlow's own legal background. The *Body of Lawes* subsequently became the foundation of all law in Connecticut.

Originally, the only court in Connecticut was the General Court which consisted of the Governor, the Deputy-Governor, twelve elected Assistants or Councillors who constituted the upper branch of the legislature, and the Representatives who made up the lower branch. When in 1662 Connecticut received a royal charter, the Governor, the Deputy-Governor and at least six of the twelve Assistants formed the highest court under the title of Court of Assistants. But this new court was still only a branch of the General Court, and the supreme judicial power was still part of the legislature and the executive. Only in 1710 was a separate Superior Court created, with a Chief Justice and four judges who, as a rule, were elected from among the Assistants. The General Assembly remained the last Court of Appeal.

Since the judges of the Superior Court were elected, they were

67 INTRODUCTION, 1 ROOT iii, iv (Conn. 1899).

mostly laymen and lawyers only incidentally, such as Roger Wolcott, originally a weaver who finally became Chief Justice in 1741, or Jonathan Trumbull (or Trumble), originally a minister and subsequently a merchant who became Chief Justice in 1766. Under such conditions there was for some time to come little chance and probably little use for orderly procedure, systematic pleading or references to the finer points of the law. The first statutes prescribing forms were passed only in 1709, 1720 and 1721. That this situation, which amounted to a utopian effort to administer justice without law, was not conducive to the emergence of a trained professional bar, needs no special comment. As a result, a legal profession or professional bar was extremely slow in developing in Connecticut, even slower than in most other colonies. The early legal history of Connecticut, therefore, forcefully affirms the maxim that justice without law usually goes hand in hand with justice without lawyers.

Among the founders of the Connecticut settlement were three men who apparently had been trained in the law. They were Governor John Haynes who is said to have been "very learned in the laws of England," Governor John Winthrop who had been a barrister in the Inner Temple (1624 or 1625), and Roger Ludlow, the author of the *Fundamental Orders* and the *Body of Lawes*. But for some reason these men did not exercise their profession, and during the seventeenth century no attorneys are known to have practiced professionally in Connecticut. Neither are there any records of trained lawyers during the same period, with the exception of Haynes, Winthrop and Ludlow.

Due to the complete absence of trained and responsible lawyers a number of sharpers, pettifoggers and spellbinders soon made their appearance to take advantage of the ever-present need of legal assistance and advice. In 1667 this situation, which apparently caused much concern and distress, compelled the General Court to pass an act prohibiting under a fine of ten shillings or stocks for one hour "all persons from pleading as attorneys in behalf of any person that is charged or prosecuted for delinquency (except he speak directly to matters of law and with leave from the authority present)"⁶⁸ But the futility of forbidding representation in litigation and the dismal consequences this interdict had for the competence and honesty of

68 ORDER OF THE GENERAL COURT OF 1667, 2 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT (Trumbull ed. 1852).

such representation were recognized after awhile. Hence in 1708 Connecticut attempted a different approach to this problem. An act was passed that "No person, except in his own case, shall be admitted to make any plea at the bar, without being first approved of by the court before whom the plea is to be made, nor until he shall take in the said court the following oath:

You shall do no falsehood, nor consent to any to be done in the court, and if you know of any to be done you shall give knowledge thereof to the justices of the court, or some of them, that it may be reformed. You shall not wittingly and willingly promote, sue or procure to be sued, any false or unlawful suit, not give aid or consent to the same. You shall delay no man for lucre or malice, but you shall use yourself in the office of an Attorney within the court according to the best of your learning and discretion, and with all good fidelitie, as well to the court as to the client."⁶⁹

This oath was subsequently included in the *Forms of Oaths Prescribed* of the year 1729. Hence the rule seems to have been that any County Court, and only a County Court, could grant admission in each particular case. In any event, not until 1750 did there exist a statute providing for the general admission to practice.

The number of attorneys, especially of unscrupulous and incompetent attorneys, must have increased fairly rapidly after the act of 1708. Persons without the proper qualifications seem to "have taken upon themselves to be attorneys at the Bar so that quarrels and lawsuits are multiplied and the King's good subjects disturbed." Hence, in order "that said mischief may be prevented and only proper persons allowed to plead at the Bar," it was enacted in 1730 "that there shall be allowed in the Colony eleven attorneys and no more. . . ." These eleven attorneys were to "be nominated and appointed from time to time as there shall be occasion by the county courts."⁷⁰ Also, in actions involving ten pounds or less, each party could retain only one attorney, while in actions involving more than ten pounds, two attorneys might be retained, and no more. This particular provision was necessary in view of the limited number of available attorneys. The act of 1730, however, was abolished the following year. That the practice of law at that time must have been fairly lucrative in Connecticut may be inferred from an act, passed in 1725,

⁶⁹ BENTON, *THE LAWYER'S OFFICIAL OATH AND OFFICE* 42 (1909).

⁷⁰ WARREN, 1 *HISTORY OF THE HARVARD LAW SCHOOL* 21 (1908).

which taxed all practicing attorneys according to their professional standing. The "least practitioners" were to pay fifty pounds annually, while all others were taxed "according to their practice."

During the eighteenth century, down to the American Revolution, the number of trained and experienced lawyers in Connecticut remained exceedingly small, and only a few of these attained any real eminence. Thomas Fitch (Yale 1721), in the opinion of his contemporaries, was probably the most outstanding or, at least, the most learned lawyer in the Colony during the first half of the eighteenth century. He was charged with the revision of the laws of Connecticut, and later was honored with the offices of Chief Justice and Governor of the Colony. Phineas Lyman (Yale 1738) and Jared Ingersoll (Yale 1742) likewise were men of distinction, while William Samuel Johnson (Yale 1744), who also held the degree of Doctor of Civil Law from Oxford, was the first American lawyer to argue a case before the King in Council. It was said of him that he "rendered an important service to his countrymen by introducing to their knowledge the liberal decisions of Lord Mansfield and the doctrines of the civilians." Also lawyers of some prominence were Mathew Griswold, "a great reader of law," who became Chief Justice in 1769; Roger Sherman, a leading personality in the American Revolution and a signer of the Declaration of Independence, of whom John Adams said that he was "as firm in the cause of American Independence as Mount Atlas"; Titus Hosmer (Yale 1757); Eliphalet Dyer (Yale 1740), who became Chief Justice of Connecticut in 1789; James A. Hillhouse (Yale 1749); Samuel Huntington, another of the signers of the Declaration of Independence who became Chief Justice in 1784; Richard Law (Yale 1751), who became Chief Justice in 1786; Samuel Holden Parsons, (Harvard 1756), who was among the first to favor American independence; Charles Chancey; Jesse Root (Princeton 1756), who authored the *Root's Reports* and subsequently became Chief Justice in 1798; and Oliver Ellsworth (Yale and Princeton 1766), who studied law in the office of Jesse Root, drafted the important Judiciary Act of 1789 and, in 1795, became the third Chief Justice of the Supreme Court of the United States. Thus it seems that in Connecticut, as elsewhere, a small group of rather prominent lawyers made its appearance just on the eve of the American Revolution.

IV. NEW HAMPSHIRE AND MAINE

New Hampshire, which had been united to Massachusetts in 1641, was made a separate Royal Province in 1679. When in 1693 the Superior Court of Judicature was established, and later, in 1699, reorganized, none of the Chief Justices were trained lawyers. The first Chief Justice with any legal experience was Theodore Atkinson, and prior to the American Revolution there were only two other trained lawyers appointed to this high judicial office, namely, Leverett Hubbard and William Parker.

The little respect in which the common law of England as well as regular procedure were held in New Hampshire may be gathered from the fact that Samuel Livermore, when charging the jury, used to caution them against paying "too much attention to the niceties of the law."⁷¹ And John Dudley, a farmer and merchant as well as Samuel Livermore's associate on the bench, would admonish the jury: "It is not law we want, but justice. They [scil., the lawyers] would govern us by the common law of England. Trust me, gentlemen, common sense is a much safer guide. . . . It is our business to do justice . . . not by any quirks of the law out of Coke and Blackstone — books that I have never read and never will — but by common sence. . . ."⁷² The same Judge Dudley would vehemently denounce demurrers, which probably frightened him, as "an invention of the Bar to prevent Justice, a part of the common law procedure . . . [and] a cursed cheat."⁷³ "Let me advise you," he once thundered at a young lawyer who quoted English law, "not to come here with your new fangled law — you must try your cases as others do. . . ."⁷⁴

The rather dismal conditions of the courts and the law in New Hampshire during most of the eighteenth century have been aptly described as follows:

As the executive functionaries were not generally lawyers, and the titular judges were often from other professions than the legal, they were not much influenced in their decisions by any known principles of established law. So much, indeed, was the result supposed to depend upon the favor or aversion of the court, that presents from suitors to the judges were not uncommon, nor, perhaps, unexpected. . . .

⁷¹ CORNING, *THE HIGHEST COURTS OF LAW IN NEW HAMPSHIRE, COLONIAL, PROVINCIAL, AND STATE*, 2 *THE GREEN BAG* 469, 470 (1890). *Cf.* CLARK, *MEMOIR OF JEREMIAH MASON* 28 (1917).

⁷² CORNING, *op. cit. supra* at 471.

⁷³ WARREN, *A HISTORY OF THE AMERICAN BAR* 136 (1913).

⁷⁴ *Ibid.*

As a matter of fact, frequent complaints were made of the partiality and venality in the administration of justice. It was not infrequent that parties were heard by the justices out of court, and that there was tampering with juries.

That under such conditions no sound legal profession could possibly develop, needs no comment. A bench composed of ignorant, though perhaps well-meaning, laymen who base their decisions on "common sense" rather than common law does not stimulate the growth or even require the presence of a trained and competent bar. During its entire colonial history New Hampshire hardly produced any professional lawyers. Although in 1714 the colony passed an act permitting parties to appear and plead by attorney, few true lawyers took advantage of the opportunity. As far as it can be ascertained, there was only one trained lawyer in New Hampshire during the seventeenth century, John Pickering, the Elder; and only three competent lawyers during the eighteenth century: namely, Mathew Livermore (Harvard 1722) whose legal competence, however, has been disputed by some; Wyseman Claggett, an English barrister who came to New Hampshire in 1758; and John Pickering, the Younger (Harvard 1761). In 1758 there were only eight known lawyers in the Colony, none of whom apparently attained to much fame.

The conspicuous dearth of trained lawyers in New Hampshire was an open invitation for all sorts of pettifoggers and sharpers to engage in the practice of law. Admission to practice in the colony followed the traditional English system of admitting attorneys, a system which was also observed in Massachusetts. Each court admitted its own attorneys according to its own discretion. The act of 1714, called *An Act Relating to Attornies*, provided that "all attornies commonly practicing in any of the courts of justice within the province, shall be under oath . . ."⁷⁵ In addition, attorney's fees were fixed at twelve shillings "in the superior court of judicature," and ten shillings "in the inferior court of common pleas." Where two attorneys had been retained, only one was "to be paid for in any case; and none but such who are allowed and sworn attorneys . . . shall have any fees taxed for them in bills of cost. . . ." These provisions concerning at-

⁷⁵ ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE IN NEW ENGLAND, chap. 37, 50 (1714).

torney's fees were merely an imitation of similar provisions contained in the Massachusetts Judicature Act of 1697.

In the beginning Maine had only a General Court, but subsequently established two inferior courts all staffed by laymen. When Maine was incorporated into Massachusetts in 1692, it became part of the judicial system already operating there.

During the seventeenth century the only trained lawyer in Maine was the Governor, Thomas Gorges, who prior to his appointment had been a barrister in England. The first resident and trained legal practitioner was Noah Emery who established himself in 1720; and on the eve of the American Revolution only six trained lawyers could be found in Maine, several of them having come from Massachusetts.

V. RHODE ISLAND

Rhode Island, which was strongly under the influence of neighboring Massachusetts, paid little attention in the beginning to the common law of England. In its place a comprehensive code of laws was promulgated in 1647, which, among other things, proclaimed that "in all matters not forbidden by the code, all men may walk as their conscience persuades them."⁷⁶ It also stated that the only law in the colony was to be that expressly declared as such by the General Assembly. Hence, only those parts of the English common law or the English statutes which pleased the General Assembly were adopted as law in Rhode Island.

Under the early compact of 1638, a "judge" and three Elders were chosen to judge and "govern according to the general rule of the word of God."⁷⁷ In 1639, a General Court was established, consisting of the Governor and eight Assistants who constituted a General Court of Trials. The royal charter of 1662-1664 vested the Governor, the Deputy-Governor and ten elected Assistants

⁷⁶ May 19, 1647, the General Assembly passed a resolution for the town of Providence: "... Wee do voluntarily assent, and are Freely willing to receive and to be governed by the Lawes of England, together wh [with] the way of the administration of them so farr as the Nature and Constitucon of this Plantation will admitt." CHAPIN, DOCUMENTARY HISTORY OF RHODE ISLAND 245 (1916). The town charter of Warwick, granted in March 1649, provided that the inhabitants of Warwick were empowered "to make constitute and ordeyne such lawes orders and Constitutions . . . as is conformable to the Lawes of England, so neare as the nature and constitution of the place will admitt; and which may best suite the estate and condition thereofe. . . ." *Id.* at 270.

⁷⁷ WARREN, A HISTORY OF THE AMERICAN BAR 140 (1913).

with the supreme judicial power. As can readily be seen, there was no distinction made between the judicial and the administrative — and in the earliest days, the legislative — powers.

The Act of the General Assembly of 1747 finally established the judicature as a separate and independent branch of the Rhode Island government. The new court set up under its provisions consisted of a Chief Justice and four “judicious and skilled persons” chosen by the General Assembly. Prior to the Act of 1747, training and experience in the law were not considered a necessary qualification for holding a judicial office. A contemporary observer remarks that in Rhode Island the judges sit on the bench as a mere formality, “more for constituting a court than for searching out the right of the causes. . . . The proceedings are very unmethodical . . . and many times arbitrary and contrary to the laws of the place”⁷⁸ But the Act of 1747 did not substantially improve on this situation. The first Chief Justice, Gideon Cowell, was not a lawyer, and neither were his associates or successors, with the notable exception of Stephen Hopkins, Chief Justice from 1751 to 1755 and a signer of the Declaration of Independence.

The presence of attorneys in Rhode Island during the seventeenth century is attested by an act, passed in 1647, which made specific reference to two English statutes (2 Edw. 4, c.28, and 4 Hen.4, c. 18) dealing with attorneys:

[A]ny man may plead his own case in any court or before any jury of record throughout the whole Colony, or make his attorney to plead for him, or may use the attorney that belongs to the court, which may be two in town, to wit: discreet, honest and able men for understanding, chosen by the townsmen, and solemnly engaged by the head officers thereof not to use any manner of deceit to beguile either court or party. And these being thus chosen and confirmed, shall be authorized, being entertained, to plead in any court of the Colony; but in case any such pleader or attorney shall use any manner of deceit . . . and be thereof attainted . . . he shall forfeit his place and never more be admitted to plead in any court of the Colony.⁷⁹

Thus it seems that by the middle of the seventeenth century the attorney “belonged to the court,” that is, was something of an officer of the court; that no more than two attorneys could belong

⁷⁸ WARREN, 1 HISTORY OF THE HARVARD LAW SCHOOL 22 (1908).

⁷⁹ Proceedings of the first general assembly . . . and code of laws adopted . . . in 1647, 58 (Staples ed. 1847).

to one court; that each court admitted its own attorneys; and that admission to practice in one court apparently conferred the right to practice in all courts within the Colony. And like in England, the penalty for professional misconduct was to be "stricken from the Roll" forever.

In 1668 or 1669 it was further provided that any person who was under indictment might retain an attorney to plead in his behalf. This particular act constituted a drastic deviation from English practice which until 1696, and in some instances, until 1836, denied any and all legal assistance to persons indicted of a felony. In 1705 it was enacted that all attorneys were to take the following oath: "[N]o attorney shall be admitted to plead in any of the Courts but shall be Sworne, not to Plead for favor nor affection for any Person, but ye meritt of the Case according to Law."⁸⁰ In 1718 it was provided that no more than two attorneys were to be retained by any one party in any case, one of which had to be a freeholder of the colony. Apparently, it had become somewhat of a practice to bring in lawyers from other colonies, especially from Massachusetts where a small but distinguished bar of great ability was gradually emerging. Perhaps the attorneys of Rhode Island were jealous of their more competent and more sought after brethren in Massachusetts and, hence, stipulated, as was done in the English circuits, that at least one Rhode Island lawyer should be "briefed" with the "foreign" lawyer. Also, in 1729 an act was passed — repealed in 1731 — forbidding attorneys to be deputies, because their presence in the General Assembly, especially when the latter sat as a Court of Appeals, was "found to be of ill consequences."

Of the early lawyers in Rhode Island practically nothing is known. It appears that the only persons who had any legal training were the men who held the office of Attorney-General, such as Daniel Updike (1722-1732); James Honeyman; Augustus Johnson; Oliver Arnold; Henry Marchant, who had studied law under Edmund Trowbridge of Massachusetts; and William Channing, who was one of the signers of the Declaration of Independence.

Although rather undistinguished at first, the legal profession of Rhode Island at a fairly early stage displayed a remarkable professional solidarity. In 1745 the lawyers of Rhode Island held

80 PUBLIC LAWS OF RHODE ISLAND, 1636-1705, 116 (Rider ed. 1896).

their first — and probably America's first — bar meeting where they agreed among themselves not "to sign blank writs . . . which practice it conceived, would make the law cheap and hurt business. . . ." ⁸¹ They also resolved that "[n]o Attorney shall take up any suit whatever against a practitioner who sues for his fees, except three or more brethren shall determine the demand unreasonable; and then, if he will not do justice, the whole fraternity shall rise up against him." This joint resolution is rather interesting in that it was aimed at protecting the profession and the professional interests of its members, but at the same time threatened members who acted against professional interest by defying the "recommendation" of the bar with collective disciplinary action. It also provided for a sort of "bar committee" to determine the reasonableness of a fee. Daniel Updike, James Honeyman, Jr., John Aplin, John Walton, Matthew Robinson, David Richards, Jr., Thomas Ward and John Andrews, apparently the leading practitioners of that time in Rhode island, signed this highly significant document.†

*Anton-Hermann Chroust**

⁸¹ UPDIKE, MEMOIRS OF THE RHODE ISLAND BAR 55 (1842); PUBLIC LAWS OF RHODE ISLAND, *op. cit. supra* at 294 ff.

† Part one of a three-part series. The second part will appear in Vol. XXXIII, No. 3 (May Issue) of the NOTRE DAME LAWYER.

* Professor of Law, Notre Dame Law School.